Public Prosecutor v Nordin bin Murhaban & Ors

HIGH COURT (IPOH) — CRIMINAL TRIAL NO PCT 45–13 OF 2001
BALIA YUSOF J
26 FEBRUARY 2005

Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Common intention — Whether there was evidence to indicate common intention among accused persons — Dangerous Drugs Act 1952 s 39B(1)(a) — Penal Code s 34

Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Evidence against accused persons purely circumstantial — Dangerous Drugs Act 1952 s 39B(1)(a)

Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Evidence of chemist ambiguous — Whether presumption of trafficking could arise — Dangerous Drugs Act 1952 ss39B(1)(a) & 37(j)

Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Whether there was custody, control or possession — Dangerous Drugs Act 1952 s 39B(1)(a)

Criminal Procedure — Statements — Cautioned statements — Whether voluntary — Trial within a trial — Whether caution administered individually to four accused persons — Whether caution explained to four accused persons

The four accused was charged with trafficking in dangerous drugs under s39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). On 4 April 2000, ASP Giam Kar Hoon (PW8), a police officer received an information that a car would be carrying a consignment of ganja from Alor Star to Kuala Lumpur. In the process, the first accused who was the driver of the said car tried to flee but was arrested by the police team. In the boot of the car two plastic parcels with Siamese writing was found and the police asked the four occupants of the car the content of the two parcels. At this point, counsel for the four accused persons objected to the answer to be given by the witness and submitted that a trial within a trial should be held in order to determine whether the answer given by the four accused persons were given voluntarily. A trial within a trial was duly convened. Inside the two parcels were found 28 packages of dried plant materials in slab form believed to be cannabis. Analysis by the Chemistry Department revealed that the 28 packages contained 25,959 grams of cannabis as defined under s 2 of the Act. The issue in this case was whether the prosecution had proved a *prima facie* case against the four accused.

Held, acquitting and discharging the four accused:

(1) The failure of the prosecution to prove the identity of the two named persons in the cautioned statement and their connection to any of the

four accused persons created a big gap and doubt to their case. The court was unable and cannot presume that the two named persons were the accused in this case. The onus was on the prosecution to prove that (see para 11).

(2) The caution was never administered individually to the four accused persons and the caution was never explained to the accused persons at all (see para 16).

(3) The overall circumstances under which the accused's statement was recorded from the accused persons had caused some sort of 'psychological oppression' and those circumstances 'appeared to be suggestive of oppression'. There were too many flaws and unsatisfactory features in the recording of the accused's statement and the prosecution had failed to prove beyond reasonable doubt that the cautioned statement was voluntarily made (see para 24).

(4) It had not been proven that any of the four accused persons were in possession of the drugs found in the boot of the car. It had not been proven whether any of the four accused persons had anything to do at all with the drugs, other than the fact that they were traveling in the car that carry the drugs. There was no evidence whether any of the accused had handled the drugs or they had any knowledge of it. The fact that many finger prints were detected on the exhibits and none of them were proven to belong to any of the accused persons, created some doubt as to whether any of the accused had anything to do at all with the seized drugs (see para 28).

(5) The evidence against the accused persons in this case was purely circumstantial. The onus on the prosecution where the evidence was of a circumstantial nature was a very heavy one, and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there were gaps in it, then it was not sufficient (see para 34).

(6) There was no evidence to indicate common intention among the accused persons. Being found in the company of each other does not prove anything for purposes of s 34 of the Penal Code. The evidence produced before the court merely showed that the four accused were traveling together in a car, and they were subsequently arrested together and 28 packages of ganja were found in the boot of the car in which they were traveling. This was far too inadequate to be considered as evidence of common intention within the meaning of s 34 of the Code (see para 35).

(7) The prosecution had failed to prove possession of the said drugs by the four accused person and the evidence so produced was insufficient to warrant the invocation of the presumption under s 37(d) of the Act (see para 39).

(8) From the evidence adduced it was clear that the drugs were originally contained in 28 packages and they were homogenised and 32 random samples were taken for analysis. The failure of the prosecution to explain further whether these 32 samples amount to at least 10% or otherwise as provided in s 37(j) of the Act proved fatal to its case. Section 37(j) of the Act was applicable in the instant case because the drugs were contained in 28 packages or receptacles within the meaning of s 37(j). As such it was incumbent on the prosecution to adduce evidence that at least 10% of the receptacles were analysed. The prosecution came short of this (see para 43).

(9) The prosecution's case was flawed in many ways. The prosecution had not proven the basic ingredients for the offence of trafficking against the accused persons and there remained a gap in the prosecution's case. The chemist evidence was doubtful, and without the evidence of admissions by the accused persons, the prosecution had nothing at all to support the charge preferred against them. In all the circumstances of the case, the prosecution had not made out a *prima facie* case against all the four accused persons to warrant the calling of their defence (see para 50).

[**Bahasa Malaysia summary**

Keempat-empat tertuduh didakwa mengedar dadah berbahaya di bawah s39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pada 4 April 2000, ASP Giam Kar Hoon (PW8), seorang pegawai polis telah menerima maklumat bahawa sebuah kereta membawa ganja dari Alor Star ke Kuala Lumpur. Dalam proses ini, tertuduh pertama iaitu pemandu kereta tersebut cuba melarikan diri tetapi telah ditahan oleh pasukan polis. Dalam but kereta dua bungkusan plastik dengan tulisan Siam dijumpai dan pihak polis bertanya keempat pengguna kereta tersebut kandungan bungkusan itu. Pada masa ini, peguam bela bagi keempat tertuduh membantah jawapan yang akan diberikan oleh saksi dan menghujahkan bahawa perbicaraan dalam perbicaraan perlu diadakan untuk menentukan sama ada jawapan yang telah diberikan oleh keempat-empat tertuduh diberikan secara sukarela. Perbicaraan dalam perbicaraan kemudiannya diadakan. Dalam dua bungkusan tersebut, dijumpai 28 bungkusan bahan tumbuhan kering dalam bentuk kepingan tebal dipercayai kanabis. Analisa oleh Jabatan Kimia mendedahkan bahawa 28 bungkusan itu mengandungi 25,959 gram kanabis seperti yang didefinisikan di bawah s 2 Akta tersebut. Isu dalam kes ini adalah sama ada pendakwa telah membuktikan kes *prima facie* terhadap keempat-empat tertuduh.

Diputuskan, membebas dan melepaskan tertuduh:

(1) Kegagalan pihak pendakwa membuktikan identiti dua orang yang dinamakan dalam pernyataan beramaran dan hubungan mereka dengan mana-mana daripada empat orang tertuduh telah menyebabkan satu

jurang yang besar dan keraguan kepada kes mereka. Mahkamah tidak boleh membuat anggapan bahawa kedua-dua orang yang dinamakan tersebut adalah tertuduh dalam kes ini. Beban adalah atas pihak pendakwa untuk membuktikannya (lihat perenggan 11).

(2) Amaran tidak pernah diberikan kepada keempat-empat tertuduh secara perseorangan dan amaran tersebut tidak pernah diterangkan langsung kepada tertuduh (lihat perenggan 16).

(3) Keadaan secara keseluruhan di mana kenyataan tertuduh direkodkan daripada orang tertuduh telah menyebabkan 'tekanan psikologi'. Terdapat terlalu banyak kesilapan dan ciri-ciri yang tidak memuaskan hati dalam merekodkan kenyataan tertuduh dan pihak pendakwa telah gagal untuk membuktikan di luar keraguan munasabah bahawa pernyataan beramaran itu dibuat secara sukarela (lihat perenggan 24).

(4) Tidak dibuktikan bahawa mana-mana daripada empat tertuduh tersebut memiliki dadah yang dijumpai dalam but kereta itu. Tidak dibuktikan sama ada mana-mana daripada empat tertuduh tersebut mempunyai apa-apa kaitan dengan dadah itu, selain daripada fakta yang menunjukkan mereka menggunakan kereta yang membawa dadah itu. Tiada bukti sama ada mana-mana daripada tertuduh menangani dadah tersebut atau mempunyai sebarang pengetahuan tentangnya. Fakta yang menunjukkan terdapatnya banyak cap jari pada eksibit dan tiada daripadanya kepunyaan yang tertuduh, telah menimbulkan keraguan berkenaan sama ada tertuduh ada kena mengena dengan dadah yang dirampas (lihat perenggan 28).

(5) Keterangan terhadap yang tertuduh dalam kes ini adalah ikut keadaan semata-mata. Beban ke atas pendakwa di mana keterangan adalah bersifat mengikut keadaan adalah sangat berat, dan keterangan tersebut mesti secara tepat menuju kepada kesalahan tertuduh. Sekiranya terdapat jurang di antaranya, ia adalah tidak mencukupi (lihat perenggan 34).

(6) Tiada sebarang bukti yang menyatakan niat bersama di kalangan tertuduh. Dijumpai bersama-sama tidak membuktikan apa-apa bagi s 34 Kanun Keseksaan. Keterangan yang dikemukakan kepada mahkamah hanya menunjukkan empat tertuduh berkereta bersama, dan mereka kemudiannya ditahan bersama dan 28 bungkusan ganja dijumpai di dalam but kereta yang dinaiki mereka. Ini adalah terlalu tidak mencukupi untuk dikira sebagai keterangan niat bersama seperti yang dimaksudkan dalam s 34 Kanun tersebut (lihat perenggan 35).

(7) Pihak pendakwa telah gagal untuk membuktikan pemilikan dadah tersebut oleh empat tertuduh dan keterangan yang dikemukakan adalah tidak mencukupi sebagai alasan untuk menggunakan anggapan di bawah s 37(d) Akta tersebut (lihat perenggan 39).

(8) Daripada keterangan yang dikemukakan, adalah jelas bahawa dadah itu pada asalnya terkandung dalam 28 bungkusan dan ia telah dihomogen dan 32 contoh secara rawak telah diambil untuk analis. Kegagalan pihak pendakwa untuk menjelaskan secara lebih lanjut sama ada 32 contoh ini memberi jumlah sekurang-kurangnya 10% atau sebaliknya seperti yang telah diperuntukkan dalam s 37(j) Akta tersebut membawa padah (fatal) kepada kesnya. Seksyen 37(j) Akta tersebut adalah terpakai dalam kes ini kerana dadah tersebut adalah terkandung dalam 28 bungkusan atau bekas seperti yang dimaksudkan dalam s 37(j). Oleh itu adalah perlu bagi pendakwa untuk mengemukakan keterangan bahawa sekurang-kurangnya 10% daripada bekas tersebut dianalisis. Pendakwa tidak memenuhi perkara ini (lihat perenggan 43).

(9) Kes pendakwa mempunyai kecacatan dari banyak segi. Pendakwa tidak membuktikan faktor asas bagi kesalahan mengedar terhadap tertuduh dan terdapat jurang dalam kes pendakwa. Keterangan juru kimia adalah diragui, dan tanpa keterangan pengakuan daripada orang tertuduh, pendakwa tidak mempunyai apa-apa untuk menyokong dakwaan ke atas mereka. Dalam semua keadaan kes, pendakwa tidak membina kes *prima facie* terhadap kesemua empat orang tertuduh sebagai alasan untuk memanggil mereka untuk pembelaan (lihat perenggan 50).]

Notes

For cases on cautioned statements, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4030–4033.

For cases on trafficking in dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 121–123.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301 (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Francis a/l Anthonysamy v PP [2003] 2 MLJ 49 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489 (refd)
Harban Singh v State AIR 1970 Burn 79 (refd)
Ibrahim v The King [1914] AC 599 (refd)
Juraimi Husin v PP [1998] 1 MLJ 537 (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14 (refd)
Low Nghee Lim v R [1956] MLJ 28 (refd)
Mahbub Shah v King Emperor 72 IR 148 (refd)
Mohamed Ali v PP [1962] MLJ 230 (refd)
PP v Aidil bin Maarof [1992] 2 CLJ 1239 (refd)
PP v Aris bin Yunus [1989] 1 CLJ 239 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)

PP v Chong Boo See [1988] 3 MLJ 292 (refd)
PP v Dato Seri Anuar Ibrahim [2001] 3 MLJ 231 (refd)
PP v Dato Seri Anuar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1997] 1 MLJ 15 (refd)
PP v Goh Kam Loi [1994] 2 CLJ 809 (refd)
PP v Kang Choo Heng & Anor [1991] 3 CLJ 2574 (refd)
PP v Lam San [1991] 3 MLJ 426 (refd)
PP v Mohd Fuzi bin Wan Teh and Anor [104] MD 4 (refd)
PP v Msimanga Lesaly & Anor [1989] 2 CLJ 682 (refd)
PP v Lian Ah Hai [1992] 3 CLJ 1733 (refd)
PP v Norfaisal [2004] 1 AMR 310 (refd)
PP v Saare Hama & Anor [2001] 4 MLJ 480 (refd)
PP v Lee Hock Lai [137] MD 4 (refd)
Sia Soon Suan v PP [1966] MLJ 110 (refd)
Tai Chai Ken v PP [1948–49] MLJ Supp 105 (refd)
Tong Peng Hong v PP [1955] MLJ 232 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (j), 37A
Penal Code s 34

Ahmad Sazilee (Deputy Public Prosecutor) for the prosecution.
Khairel Azwa (S Ravichandran & Anuar) for the accused persons.

Balia Yusof J:

[1] The four accused persons stand charged as follows:

> Bahawa kamu pada 4 April 2000, lebih kurang jam 11.20mlm di Tol Jelapang, Ipoh di dalam Daerah Kinta di dalam Negeri Perak Darul Ridzuan dengan niat bersama, telah memperedarkan dadah berbahaya iaitu 25,595 gram cannabis dan oleh itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) dan dibaca bersama s 34 Kanun Kesiksaan dan boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] Briefly the facts of the case are as follows.

[3] On 4 April 2000 at about 2pm ASP Giam Kar Hoon (PW8), a police officer from the Narcotics Division Bukit Aman received an information that a car bearing registration no WHG 4701 will be carrying a consignment of ganja from Alor Star to Kuala Lumpur. Immediately upon receiving the information this witness assembled a team of police personnel and started swinging into action. ASP Giam was assisted by Inspector Ashril ('PW4') who gave a briefing to the team and at about 5pm they started their journey to Alor Star. The team reached Alor Star at about 8pm and another briefing was done at the compound of the Alor Star stadium. The team split into two. One was headed by PW8 and the other by PW4. ASP Giam and his team waited at the Alor Star Utara toll plaza while Inspector Ashril and his team were stationed

at the Alor Star Selatan toll plaza. After waiting for about one hour, at about 10pm PW8 spotted a car fitting the description given in the information with four persons inside passing by and he started trailing it. At about the same time PW4 was also informed by PW8 and both started trailing the said car WHG 4701 along the North South Highway until they reached the Jelapang toll plaza in Ipoh. Throughout the journey from the Alor Star toll plaza to the Jelapang toll plaza PW8 testified that the car they were following never stopped and also never got off from the North South Highway. For completeness, it is worth mentioning that PW8 was trailing the car in a Pajero while PW4 was using a Proton Wira and the car WHG 4701 was also a Proton Wira.

[4] On reaching the Jelapang toll plaza, the car WHG 4701 was intercepted and the four occupants of the car were arrested. In the process, the first accused who was the driver of the said car tried to flee but was arrested by the police team. PW4 opened the boot of the car and found two plastic parcels with Siamese writing on it and PW4 asked the four occupants of the car the content of the two parcels. At this point, counsel for the four accused persons objected to the answer to be given by the witness and submitted that a trial within a trial should be held in order to determine whether the answer given to PW4 by the four accused persons were given voluntarily. A trial within a trial was duly convened at the end of which the court ruled that the answer given by the four accused persons as to what was contained in the two parcels found in the boot of the car was inadmissible as evidence.

[5] Inside the two parcels were found 28 packages of dried plant materials in slab form believed to be cannabis. PW4 marked the 28 packages as A1 to A23 and B1 to B5 and also placed his signature on them. PW4 then drove the car WHG 4701 together with two of the accuseds while the other two were driven in a separate vehicle to the Ipoh police headquarters. The exhibits were all along in the custody of PW4. PW4 then lodged a police report at the Ipoh Police Headquarters which was tendered and marked as exh P23. The four accused persons together with the exhibits were then handed over to Chief Insp Hilmi bin Ahmad (PW7) at about 3.25am on 5 April 2000. As the investigating officer, PW7 subsequently sent the 28 packages to the Chemistry Department Ipoh for analysis on 7 April 2000 and received back the same together with the chemist report on 17 August 2000. Analysis by the Chemistry Department reveals that the 28 packages contained 25,959 grams of cannabis as defined under s 2 of the Dangerous Drugs Act 1952 (hereinafter referred to as the 'Act'.)

[6] The prosecution called nine witnesses to prove its case against the four accused persons and at the end of the prosecution's case, I found that the prosecution has failed to prove a *prima facie* case against the four accuseds and I accordingly acquitted and discharged them without calling for the defence.

A TRIAL WITHIN A TRIAL

[7] As narrated in the brief facts of the case, the evidence of the prosecution against the accused is centered mainly on the evidence of Inspector Ashril ('PW4') whose evidence is corroborated by the evidence of ASP Giam Kar Hoon ('PW8') and the evidence of these two prosecution witnesses are almost identical. The prosecution also sought to introduce a statement made by the four accused persons immediately after their arrest at the Jelapang toll plaza. This statement was allegedly made by the accuseds upon being questioned by PW4 as to what is the content of the two parcels found in the boot of the car. On the objection of the learned counsel for the accuseds as to the admissibility of that statement, a trial within a trial was commenced and both PW4 and PW8 came to the fore to give evidence for the prosecution. In his evidence during the trial within a trial, PW4 (hereinafter referred to as TSP1) stated that at the time of arrest, he read the caution under s 37A of the Act to the four accused persons and he wrote down in his dairy the caution which each of the four accuseds confirmed that they understand the same. TSP1 further testified that at the time of administering the caution, all the four accuseds were calm and acted normally. After administering the caution, TSP1 asked the four accused persons to sign which they did accordingly. After having obtained their signatures, TSP1 proceeded to ask the four accuseds about the exhibits found in the boot of the car to which all the four accuseds replied that they are ganja contained in two sacks. TSP1 again noted down the answer given by the four accuseds in the dairy. A copy of this diary containing the details as given in the evidence of TSP1 above was produced and marked as exh TP–1.

[8] According to TSP1 the content of TP–1 was read back to all the accused persons and they confirmed it to be true. The witness further stated that at no time during the cautioning and questioning the accuseds and the recording of their answers did he use any words or did any acts which can be said to be a threat to the accused persons. TSP1 further testified that at the time of recording of the answers by the four accused persons, ASP Giam ('PW8') was with him. During cross examination, TSP1 stated that all the four accuseds were handcuffed and the statements were recorded at an open space at the toll plaza. This witness also stated that he and the rest of the police party were not in uniform and were armed. He denied that the statement given by the accuseds were never read back to them and also denied that guns were pointed to the accuseds during the recording of the statement.

[9] The second witness called by the prosecution in the trial within a trial was ASP Giam Kar Hoon ('TSP2') who testified that when the caution was administered to the four accused persons by TSP1, he was around and heard TSP1 giving the caution. He also saw TSP1 noting something after administering the caution to the four accused persons. All the four accused persons were seated on the road beside the car WHG 4701 and appeared calm although

their hands were handcuffed to the back. He further testified that neither he nor TSP1 ever made any threat, promise or inducement to the accuseds in recording their statements. During cross examination by the defence counsel, TSP2 stated that the statement was recorded at an open space and there were other police personnels guarding the four accused persons during the process.

[10] The defence opted not to give any evidence and choose to make submissions following the procedure approved in cases like *Public Prosecutor vDato Seri Anuar Ibrahim* [2001] 3 MLJ 231 and *Public Prosecutor v Aidil bin Maarof* [1992] 2 CLJ 1239. In his submission, learned counsel for the accuseds seriously objected to the admissibility of the statement tentatively marked as exh TP–1. Perusing the said exhibit, it is clear that it contains a caution under s 37A of the Dangerous Drugs Act 1952. There also appears four signatures on the same, marked as 1, 2, 3, 4. There appears also four names and from the four names appearing in TP–1, two names are total strangers to this case. The names of Mohd Salleh bin Kassim @ Md Zain and Mohd Fuat bin Abdul Rahman do not relate to any of the accuseds in this case. There was no explanation whatsoever during the trial within the trial who were these Mohd Salleh bin Kassim @ Md Zain and Mohd Fuat bin Abdul Rahman. Although PW4 testified that the first signature belongs to Mohd Salleh bin Kassim @ Md Zain and the fourth signature belongs to Mohd Fuat bin Abdul Rahman, it has never been established from any of the two prosecution witnesses in the trial within a trial as to their identity in relation to the accuseds present in the dock. None of the two prosecution's witnesses identified the four accuseds person in the dock during the trial within a trial. In his evidence during the trial within a trial TSP1 merely said the following:

> Saya ada tulis 1234 pada tandatangan tersebut mengikut nama OKT di muka surat 80 dalam TP–1. Tandatangan No 1 adalah Mohd Salleh bin Kassim @ Md Zain. Saya dapati daripada kad pengenalan Mohd Salleh. Tandatangan kedua kepunyaan Murdani bin Insya. Saya dapati daripada kad pengenalan Murdani. Tandatangan No 3 adalah kepunyaan Mohd Jiwa bin Zakaria. Tandatangan No 4 adalah tandatangan Mohd Fuad bin Abdul Rahman. Mohd Jiwa dan Mohd Fuad didapati identiti mereka daripada kad pengenalan mereka.

[11] Such being the evidence before this court, the question still remains which of the four accuseds appearing before the court is Mohd Salleh bin Kassim @ Md Zain and Mohd Fuad bin Abdul Rahman? The failure of the prosecution to prove the identity of these two named persons and their connection to any of the four accused persons creates a big gap and doubt to their case. The court is unable and cannot presume that the two named persons are the accused in this case. The onus is on the prosecution to prove that. The appearance of the two names in exh TP–1 which are different from the names of the accused persons present in the dock before me give rise to a serious doubt in my mind in accepting the statement in exh TP–1. It was contended by the learned deputy public prosecutor that there is no doubt as

to the identity of the persons signing the statement in exh TP–1 as the recording officer TSP1 has identified in court that the four signatures were signed by the four accuseds in the dock. Be that as it may, in my view such identification by the recording officer without further proof as to their identity is insufficient to close the gap left in the prosecution's case. Who is Mohd Fuad bin Abdul Rahman and Mohd Salleh bin Kassim @ Md Zain named in exh TP–1 was never conclusively proved by the prosecution during the trial within a trial. It was only when the investigation officer, PW7 was called in the continuation of the main trial that the identity of these two named persons were revealed and a police report to that effect was lodged by the same. In his evidence PW7 stated that from his investigation the person named Mohd Salleh bin Kassim @ Md Zain is actually Nordin bin Murhaban the first accused and the true identity of the person named Mohd Fuad bin Abdul Rahman is Taufik bin Mohamad, the third accused. The two, according to PW7's evidence were using someone else's identity cards. Be that as it may, it is already too late for the prosecution to salvage their case in the trial within a trial as to the identity of the two named persons who gave their statements in TP–1. This evidence was not forthcoming during the trial within a trial.

[12] As stated by Ong Hock Thye Ag CJ (Malaya) (as he then was) in *Sia Soon Suan v Public Prosecutor* [1966] MLJ 110 at p 118:

> The requirement of strict proof in criminal cases cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on evidence adduced and nothing else.

[13] Having scrutinized exh TP–1, as I have stated earlier there appears a caution under s 37A of the Act and it certainly appears to me that the caution is meant for the four named persons whose signatures appear immediately following it. Relying on the authority of *Public Prosecutor v Norfaisal* [2004] 1 AMR 310 the learned counsel for the accuseds submitted that TP-1 shows that only one caution was administered when in fact it was intended for all the four accuseds in this case. I share the same doubts as expressed by Richard Talalla J (as he then was) in the case of *Public Prosecutor v Kang Choo Heng & Anor* [1991] 3 CLJ 2574 as to whether s 37A permits a caution to be administered in the singular when administered to more than one person. In that case, His Lordship held that *prima facie*, each person should have been separately cautioned. On the same premise, I am also persuaded by the judgment of Mohd Hishamuddin J in *Public Prosecutor v Msimanga Lesaly & Anor* [1989] 2 CLJ 682 that where there are multiple accused, the caution must be administered separately to each of them.

[14] Referring to the case of *Public Prosecutor v Norfaizal* on this issue, Low Hop Bing J at p 316 said:

In my view, proviso (b) to s 37A is clear and it is the duty of the court to give effect to the intention of Parliament ie an individual accused in his own right is entitled to be administered a caution, and by corollary, if there are multiple accused, as in the instant case, two persons has been arrested, each and every one of them is individually entitled to have the caution administered to him. This is a measure by way of a safe guard, so that he may individually or separately exercise his right to remain silent if he is minded to do so.

[15] In his evidence during the trial within a trial, TSPI never stated that the caution was administered to the accused individually but merely says that:

Pada masa tangkapan saya ada beri kata-kata amaran kepada tertuduh.

Amaran di bawah s 37A1(b) Akta Dadah Berbahaya. Saya ada tanya tertuduh sama ada mereka faham Bahasa Malaysia. Mereka mengaku faham.

...

Selepas beri amaran, saya arahkan OKT menurunkan tandatangan mereka. Saya tidak paksa OKT turunkan tandatangan. Mereka dengan sukarela tandatangan diari saya.

[16] The evidence before this court clearly suggests that the caution was never administered individually to the four accused persons and this is further fortified by the documentary evidence in exh TP–1.

[17] It has always been emphasized that the administering of a caution to an accused person is not a mechanical exercise and shall never be treated to be so. In this respect, the explanation of the caution to the accused is an important element for the court must be satisfied that the accused understand the nature and consequences of the caution. To most layman, the words of the caution as it is enacted in the provisions of the law may seem too legalistic and technical. It requires explanation. As opined by Shaik Daud J in *Public Prosecutor v Mohd Fuzi bin Wan Teh and Anor* [104] MD 4 at p 654:

It is my view that administering of the caution should not be merely a mechanical exercise of just reading it to the accused. PW8 should have not merely read the caution but also explained it and its consequences to the accused.

[18] From the evidence of the recording officer TSP1, he admits that after administering the caution he instructed the four accused persons to put their signatures when he says the following:

Selepas beri amaran, saya arahkan OKT menurunkan tandatangan mereka.

[19] Exhibit TP–1 supports the evidence of the witness. It does not show that the caution was explained to each of the accused person. Exhibit TP–1 shows that PW4 merely reads the caution once and this was followed by four answers purportedly from each of the accused. It reads this:

S: Adakah kamu semua faham amaran yang telah saya bacakan?

J: Mohd Salleh bin Kasim @ Md Zain 700210–02–5167 A1499188 faham amaran yang telah saya bacakan.

J: Murdani bin Insya 680305–71–5149 faham amaran yang telah saya bacakan.

J: Mohamad Jiwa bin Zakaria 760616–12–5445 A3363960 faham amaran yang telah saya bacakan.

J: Mohamad Fuad bin Abdul Rahman 731029-04-5261 A2608954 faham amaran yang telah saya bacakan.

[20] From his own recording, it is crystal clear that TSP1 merely reads the caution when he recorded that 'saya bacakan' in TP–1. However during cross examination this witness disagreed when it was put to him that he never explained the caution to the accused persons. He says:

Saya tidak setuju bahawa saya hanya bacakan amaran tanpa menerangkannya.

[21] I shall not labour any further on this matter and suffice for me to say that from what is evident from exh TP–1, it is too late for the witness either to deny or to add anything further than what is stated in the said exh TP–1. On the evidence before me7 I am satisfied that the caution was never explained to the accused persons at all. By his own note in exhibit TP-1, the witness admits that he merely reads the caution and the four accused persons took turn to answer his question. This is highly unsatisfactory (*Public Prosecution v Mohd Fuzi bin Wan Teh and Anor*, *Public Prosecutor v Lian Ah Hai* [1992] 3 CLJ 1733).

[22] Another objection on the statement made by the accuseds as purportedly shown in exh TP–1 is on the issue of whether the statement was read back to them and they be given the opportunity to make correction thereto. In his evidence, TSP1 stated that he did read back the statement to all the accused persons and they confirmed it to be true, and recorded that fact at the end of the statement as shown in exh TP–1. However there is no confirmation of that fact and there is no signature of the accuseds at the end of the statement. The signatures of the accuseds appear at the end of the caution, but in my view this is not indicative of the fact that they acknowledge the statement. The absence of their signatures at the end of the statement raises some doubt in my mind whether they did acknowledge the statement. For that matter, I must further observe that the recording officer himself never sign the statement. There is nothing in exh TP–1 to indicate who recorded the statement. The recording officer has had every opportunity to get that acknowledgement from the accused persons but he has failed to do so. Thus the issue of whether the statement was read back to them and they being given the opportunity to make corrections or any alteration still remains in the twilight zone and give rise to speculation and inferences. Such being

the case, an inference more favorable to the accused persons should be adopted and I do so in the instant case.

[23] It is trite that the onus is on the prosecution to prove voluntariness beyond all reasonable doubt and not for the defence to prove involuntariness (*Ibrahim v The King* [1914] AC 599, *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, *Public Prosecutor v Chong Boo See* [1988] 3 MLJ 292). The accused need only raise on the balance of probabilities some doubt in the judge's mind as to the voluntariness of the statement and the fulfillment of other requirements, in order to exclude the admission of the statement. (*Public Prosecutor v Aris bin Yunus* [1989] 1 CLJ 239). In *Public Prosecutor v Goh Kam Loi* [1994] 2 CLJ 809 at p 814, Vincent Ng JC (as he then was) has listed various points to be considered in deciding the issue of admissibility of a cautioned statement under s 37A of the Act and among others he listed:

(1) …

(2) …

(3) ...

(4) The onus is not on the accused to show involuntariness but on the prosecution to prove beyond any reasonable doubt that the confession was voluntary which in ordinary parlance means of one's own free will (See eg *Ibrahim v The Emperor* [1914] AC 599, *Wong Kam Ming v The Queen* [1980] AC 247, *Public Prosecutor v Chong Boo See* [1988] 3 MLJ 292).

(5) …

(6) The expression 'of one's own free will' would mean that the prosecution would have to show that the accused did not feel somewhat constrained to make the statement and he was completely free from any form of restraint when giving the statement. See Mohd Fauzi's case at p 654 E left and *Pendakwa Raya v Chuah Chee Phe & satu yang lain* [1991] 2 CLJ 924.

(7) The phrase 'any form of restraint' has recently been held to include psychological restraint or, in the words of Edgar Joseph Jr SCJ (as he then was), 'psychological oppression' where his Lordship has held, in *Hasibullah bin Mohd Ghazalli v Public Prosecutor* [1993] 2 AMR 43, that, to quote: 'In the instant appeal the judge failed to recognise that psychological oppression can be more insidious than, and just as effective, as physical pressure on a suspect who in many cases will be incapable of evaluating its effect upon him, and not sufficiently articulate to explain the circumstances and effect to the court'.

(8) The test to be applied as to whether the statement was voluntary is a subjective test, namely whether the court is satisfied from the facts and surrounding circumstances that the effect in the mind of the accused is that he has to make a statement whether he likes it or not. See *Mohd Yusof bin Haji Ahmad v Public Prosecutor* [1983] 2 MLJ 169F. In other words, in deciding whether or not a statement made by an accused person was obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority, the cardinal point is not so much the state of mind of the person in authority but that of the accused.

(9) It was also held in *Hasibullah*'s case that voluntariness' test has been expanded to include within its ambit statements which are rendered inadmissible by reason of the fact that they were obtained under oppressive circumstances. And though the provisions of proviso (a) to s 37A(1) of the Dangerous Drugs Act which repeats s 24 of the Evidence Act, do not provide for this as a ground for excluding a confession by an accused person, the high authority for this is the Federal Court case of *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232, which appears to have incorporated the common law. In *Dato Mokhtar bin Hashim v Public Prosecutor* the court found that the trial judge was wrong in failing to exclude the statement made by the accused because it was the result of prolonged periods of questioning into the small hours of the morning which 'appeared to be suggestive of oppression.' In so holding, the court applied the definition of oppression propounded by Sach J in *R v Priestley* (1965) 51 Cr App Rep 1 as, 'something which tends to sap and has sapped that free will which must exist before a confession is voluntary', which was adopted in *R v Prager* [1972] WLR 260. And in *R v Fulling*[1987] 2 All ER 65, a Court of Appeal decision, Lord Lane, CJ held that, to quote '…oppression must be given its ordinary dictionary meaning and applied the definition of that word as it appears in the *Oxford Dictionary* which says this:

> Exercise of authority or power in a burdensome, harsh or wrongful manner, unjust or cruel treatment of subjects, inferiors, etc; the imposition of unreasonable or unjust burdens.

(10) ...

(11) It is plainly obvious that the above requirements and the onus of proof expected of the prosecution are indeed very onerous and stringent. The reasons being that the courts have in the past often taken the sensible and common sense approach on the issue of the admissibility of cautioned statements when confronted with the stark truism; that it would seem counter to the very grain of normal human conduct for a person, who, as enjoined by s 37A(1) has to be sufficiently impressed by the caution to be administered, that he is bound to answer any question relating to the case, and that his statements (including statements amounting to confession — as so often the case) may be admissible or used in evidence at the trial, and who, indeed, would most probably also have been aware that the death sentence await the crime alleged against him, would nevertheless with true voluntariness confess away his life, so to say.

[24] Having in mind the above stated principles, it is incumbent upon the court to consider the surrounding circumstances under which the statements were extracted from the accused persons. The team of police officers, all armed, pounded upon the accused persons at the toll plaza and immediately effected the arrest. One of the accused, the driver of the car who tried to escape was also immediately arrested after a scuffle and was injured in the process and was bleeding. They were, according to the prosecution's own witnesses, shocked or appear to be in a state of shock. All were handcuffed and were made to sit on the road near the toll plaza at the time when their statements were recorded by TSP1. According to TSP2, the rest of the other police personnel's stood guard, and the place was not so bright. There were altogether eight police personnels involved, including the two witnesses who were called to give evidence during the trial within a trial. Of course the mere fact that there may

be some restriction on the movement of the accused, or the accused person may be under some sort of surveillance at the time when he makes the confession would not ipso facto vitiate the confession as being involuntary (*Harban Singh v State* AR 1970 Burn 79). Bearing in mind and considering the circumstances which the accused were in and applying the objective test, would entail asking the question whether the accused persons would have felt somewhat constrained or compelled to make the statement? In other words, what is the effect of these sorrounding circumstances on the accused's state of mind? In the event, I find that the overall circumstances under which the statement was recorded from the accused persons had caused some sort of 'psychological oppression' as envisaged in *Hasibullah bin Mohd Ghazalli v Public Prosecutor* and those circumstances 'appeared to be suggestive of oppression'. On the totality of the evidence before me, I found that there are too many flaws and unsatisfactory features in the recording of the accused's statement as exhibited in TP–1. Taking into account these unsatisfactory features there arises a suspicion in my mind as to the voluntariness of the statement made by the accuseds and accordingly I hold that the prosecution has failed to prove beyond reasonable doubt that the statement in exh TP–1 was voluntarily made. As stated by Gopal Sri Ram JCA in *Juraimi Husin v Public Prosecutor* [1998] 1 MLJ 537 at p 791:

> It is equally trite that the only burden that rests upon an accused is to place before the judge such facts as raise a well-grounded suspicion that the statement was made involuntarily.

[25] By the terms of the language employed in the legislature, the determination of the question of voluntariness of the statement is a matter for the court to decide and not for the recording officer. There is nothing in the law that requires the recording officer to be satisfied that the statement was made voluntarily before recording it. It is for the court to so decide. (See *Francis a/l Anthonysamy v Public Prosecutor* [2003] 2 MLJ 49).

TRAFFICKING

[26] To bring home a charge of trafficking in dangerous drugs, the prosecution must prove that what the accused person did in this case come within the meaning of trafficking as defined in s 2 of the Dangerous Drugs Act 1952 which defines trafficking as follows:

> Unless the context otherwise requires, trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug.

[27] The drugs in the present case were recovered from the boot of the car driven by one of the accused persons. Given that fact, can they be accused of doing any of the acts envisaged in the context of s 2 above? As a matter of

common sense, it follows that to prove trafficking under that section, it would be necessary for the prosecution first and foremost to prove that the accuseds were in possession of the drugs or that they were in custody and control of the drugs found in the boot of the car, for, unless they were in possession or in custody or control of it, they would not be in a position to traffic in such drugs (*Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705). Thomson J (as he then was) in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 at p 239 has defined possession in the following words:

> Possession' itself as regards to the criminal law is described as follows in *Stephen's Digest* (9th Ed, p 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused not only be so situated that he can deal with the thing as if it belonged to him, for example, have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words that he had some animus possidendi. Intention is a matter of fact which in nature of things cannot be proved by direct evidence. It can only be proved by inference from surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[28] On the evidence adduced by the prosecution, it has not been proved that any of the four accused persons were in possession of the drugs found in the boot of the car. It has not been proven whether any of the four accused persons had anything to do at all with the drugs, other than the fact that they were traveling in the car from Alor Star to the Jelapang toll plaza. It is still a mystery as to how the drugs got into the car and there is also no evidence whether any of the accused had handled the drugs or they had any knowledge of it. Finger printing was done by the police and according to the evidence of PW7, the investigating officer, the result shows that there were many overlapping finger prints found on the exhibits and it was impossible to do any comparison. Although by itself is not conclusive, the fact that many finger prints were detected on the exhibits and none of them were proven to belong to any of the accused persons, creates some doubt as to whether any of the accused had anything to do at all with the seized drugs.

[29] In *Low Nghee Lim v R* [1956] MLJ 28 Taylor J at p 28 said:

> There is no presumption of custody. The presumption is from custody. Unless custody is established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by

necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are, and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them not amounting to possession.

[30] The evidence against the accused persons in this case is purely circumstantial if any. The finding of the drugs in the boot of the car, in the absence of the confession of the accuseds which the court has ruled out earlier left the prosecution with nothing against the four accused.

[31] An attempt has been made by the learned deputy public prosecutor to link the accuseds to the drugs on the presumption as provided for in s 37(d) of the Act which reads as follows:

Any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drugs and shall until the contrary is proved, be deemed to have known the nature of such drug.

[32] From the evidence adduced, clearly the four accused were in custody and control of the car or at least, the first accused who was driving it at the time of the arrest. PW5, the owner of the car hired out his car to PW6 who runs a car rental business. PW6 in turn rented out the car to the first accused on 6 March 2000 for a sum of RM800 per month. At the time of the arrest, the first accused was the driver of the said car while the three other accused were passengers. All four accused were under surveillance by the police team the moment they approached the Alor Star Utara toll plaza at about 10.00pm and were trailed to the Jelapang toll plaza, Ipoh. Throughout the period, which took about 1 hour 20 minutes according to the prosecution witness, none of the accuseds were seen leaving or getting out of the car. The four accused persons remained throughout the journey in the car and they did not even stop at any of the rest areas along the highway.

[33] To start with, I respectfully agree with the proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v Public Prosecutor* [1955] MLJ 232 that a vehicle in which a drug is carried does not ipso facto fall within the words of 'anything whatsoever containing any dangerous drugs' and therefore, the presumption under s 37(d) does not arise. This proposition of law was approved by the Supreme Court in the case of *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561. Lest we forget, the words of Ong J (as he then was) on the invocation of presumption should always be a guide where in *Mohamed Ali v Public Prosecutor* [1962] MLJ 230 His Lordship had cautioned:

Presumption of facts must not be drawn automatically, or as it were, by rule of thumb, without first considering whether in the circumstances of each particular case there were adequate grounds to justify any presumption being raised. Even, with regard to presumption of law. Darwin J said recently in *Berry v British Transport Commission*:

> … presumption of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable in the sense that estoppel is a doctrine that should never be applied without a necessity for it; per Bramwell J in *Baxendale v Bennett* because they prevent the Court from ascertaining the truth, which should be the prime object of a judicial investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.

[34] It is obvious that the prosecution is relying on circumstantial evidence to prove that the accuseds had in their custody and control of the 28 packages of drugs found in the boot of the car. It is trite law that the onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one, and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient. (Per Pike CJ in *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36).

[35] Much has been submitted by the learned deputy that the conduct of the first accused who was the driver of the car in trying to abscond at the time of the arrest suggests that he has knowledge of what was carried in the boot of the car. Be that as it may, even if any inference is to be drawn from that fact, I must say that it is only against the first accused alone. There is no evidence whatsoever as to impute any knowledge on the part of the other three accuseds. In my view by bringing in s 34 of the Penal Code into the charge does not help the prosecution in this case. There is not an iota of evidence to indicate common intention among the accused persons. Being found in the company of each other does not prove anything for purposes of s 34 of the Penal Code. The evidence produced before the court merely shows that the four accused were traveling together in the car from Alor Star to the Jelapang toll plaza, Ipoh, and they were subsequently arrested together and 28 packages of ganja were found in the boot of the car in which they were traveling. This is far too inadequate to be considered as evidence of common intention within the meaning of s 34 of the Code.

[36] The effect of s 34 of the Penal Code (Act 574) has been discussed in the Indian Privy Council case of *Mahbub Shah v King Emperor* 72 IR 148 in the following term at p 153:

> To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused person in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies pre-arranged plan; and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

[37] Turning to the evidence of the first accused's flight from the scene of crime, I am constrained not to draw any inference of his knowledge of the drug found in the boot of the car, for that conduct may equally be consistent with his immediate reaction to the sudden blockage of his car by the arresting party at the toll plaza. It was a conduct equally consistent with the accused being in a state of pure panic bearing in mind the sorrounding circumstances at the point in time. Considering the sorrounding circumstances, namely the sudden appearance of the police team who were armed and not in uniform and pointing their guns towards them, it would be quite normal to expect some reactions from them, and of course one can expect different reaction from different people. As the case of the passengers in the car (the other three accuseds) they were, according to the prosecution witness in a state of shock. Augustine Paul J in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 at p 664 stated:

> But evidence of mere absconding or flight is not such a vital circumstance which can be considered to show that the absconder was having a guilty mind (see *Bhagat Bahadr v State* (1996) Cri LJ 2201. Such conduct must be considered in the totality of the evidence adduced (see *Pendakwa Raya v Mansor Mohd Rashid* [1996] 3 MLJ 560). For it to be capable of amounting to an admission of guilt there must be a nexus between his conduct, his flight and the offence in question.

[38] Further more, where from a given set of facts more than one inference can be made, it is trite that the one more favorable to the accused person ought to be adopted and the benefit be given to the accused. Spencer Wilkinson J in *Tai Chai Ken v Public Prosecutor* [1948–49] MLJ Supp 105 at p 108 said:

> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of the opinion that the inference most favorable to the accused ought to be adopted.

[39] On the totality of the evidence adduced, I hold that the prosecution has failed to prove possession of tha said drugs by the four accused person and the evidence so produced is also insufficient to warrant the invocation of the presumption under s 37(d) of the Act. Accordingly the charge of trafficking in the same also fails.

CHEMIST EVIDENCE

[40] I shall now consider the evidence of PW9, the Government Chemist. The evidence of the chemist has been challenged by the defence principally on the ground that the test carried out by the chemist has failed to meet the requirements of s 37(j) of the Act. Section 37(j) reads as follows:

> Where any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less then ten per centum of such receptacles and if such analysis established that such sample are all of the same

nature and description, it shall be presumed, until the contrary is proved, that the contents of all receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

[41] In his evidence, PW9 stated that he carried out the usual four tests on the exhibits handed to him by Inspector Hilmi ('PW7'). The first two tests being physical examination of the drugs and secondly, a microscopic examination of the same. In respect of these two tests, the witness testified that he did a 100% examination on all of the exhibits and was satisfied that they were cannabis. But while the result of such examination might well establish that they were cannabis within the meaning of s 2 of the Act, it was necessary to take the matter further and establish beyond any reasonable doubt that was so. For the next two tests namely the Dequenois Levine Test (DLT) and the Thin Layer Chromatography Test (TLC), he testified and I now reproduce the relevant part of his testimony as follows:

Saya campurkan bahan tumbuhan tersebut sehingga sekata dan mengambil *32 sampel perwakilan rawak* untuk dua ujian kimia iaitu ujian DLT. Saya dapati semua sampel 32 menghasilkan warna ungu pada lapisan klorofom, menunjukkan kehadiran cannibinoids iaitu bahan aktif dalam resin cannabis.

Ujian keempat ialah TLC. Saya mendapati kesemua sampel yang diambil menghasilkan spot cannibinoids THC dan CBN dengan itu resin cannibinoids disahkan.

Keputusan keseluruhannya daripada 4 uji-kaji tersebut saya dapati semua bahan-bahan tersebut ialah cannabis seperti yang ditakrifkan dalam s 2 Akta Dadah Merbahaya 1952.

[42] Earlier, the witness has stated that the dried plant materials were wrapped in plastic packets marked as A1 to A23 and Bl to B5 totaling altogether 28 packages and he carried out the physical examination and microscopic examination on 100% of the substance contained in those 28 packages. During cross examination the witness states:

Semua bahan dianalisis.

Tiada bahagian yang tidak dianalisis.

Ujian 100% adalah di atas keempat-empat jenis ujian. Saya tidak setuju bahawa 32 sampel yang diambil untuk ujian DLT bukan 100% barang kes.

and during re examination by the learned deputy public prosecutor the witness reiterates:

'sampel' bermaksud contoh yang saya ambil dari bahan tumbuhan tersebut. Sampel perwakilan rawak bermaksud sampel yang diambil secara tidak tentu dan oleh kerana itu ia mewakili 100% bahan yang diuji.

[43] From the narration of the evidence of PW9 above on the relevant points touching on the issue of the sufficiency of the test carried out in determining the nature of the drugs, it is clearly evident that the testimony of the said witness is contradictory or at least inconsistent. While stating that he analysed only the 32 random samples of the substance during his examination in chief, he next says during cross examination that he examined 100% of the substance and denies that the 32 random sample he took is not 100% of the substance. And during re examination he explained that sample means the sample he took randomly from the substance to be a representative sample. There is a clear contradiction in his evidence as to whether 100% of the substance was examined or only the 32 random samples. In it's totality I found that from the evidence of PW9 there still remains a doubt as to how much of the substance from 28 packages were examined for the two chemical tests. The evidence of PW9 indicates that he homogenized the content of the 28 packages of dried plant material out of which his took 32 samples for analysis indicating that only a portion was so taken. How much was this portion? And how much is this 32 sample? Does it mean that all the contents of the 28 packages were divided into 32 packages and 100% of each of the 32packages were analysed? Or does it mean that the 32 samples are taken not from all the contents of the 28 packages but only from a portion of it? If so what is the amount/weight of the 32 samples and what is the percentage of these 32 samples from the total number of packages of the drugs? From the evidence adduced it is clear that the drugs were originally contained in 28packages and they were homogenized and 32 random samples were taken for analysis. The failure of the prosecution to explain further whether these 32 samples amount to at least 10% or otherwise as provided in s 37(j) of the Act proves fatal to its case. In my view s 37(j) is applicable in the instant case because the drugs were contained in 28 packages or receptacles within the meaning of s 37(j). As such it is incumbent on the prosecution to adduce evidence that at lest 10% of the receptacles were analysed. The prosecution comes short of this. On the meaning of receptacle, I am indebted to my learned brother KP Gengadharan Nair JC (as he then was) who had the occassion to consider the meaning of that word in *Public Prosecutor v Lee Hock Lai* [137] MD 4. At p 564 it was stated:

> The *Oxford English Dictionary* (8th Ed) describes 'receptacle' more simply as an object used to contain something'. A plastic packet is an object used to contain or hold something and therefore quite clearly comes within the scope of the meaning of the word 'receptacle.' Thus, in my view, plastic packets or bags etc. are receptacles.

[44] I am fully aware of the approach that the court should take in dealing with chemist evidence, that is, to accept the evidence of the chemist as true even though the chemist has not shown in detail what he did in the laboratory, unless the evidence is so inherently incredible that no reasonable person can believe it to be true or there is evidence that contradicts from another expert (see *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004]

4 MLJ 489). In *Public Prosecutor v Lam San* [1991] 3 MLJ 426, Hashim Yeop A Sani CJ (Malaya) delivering the judgment of the court, said:

> As to how a trial court should approach the evidence of a chemist, we wish to advert to the judgment of this court in *Munusamy v Public Prosecutor* where in a passage at p 496 F, Mohamad Azmi SO on behalf of the court put in focus the function of the chemist in a trial of this nature:
>
> > We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.

[45] I have given every consideration to the evidence of the chemist ('PW9') but I found that the evidence is not only too scanty but as I have stated earlier, is also contradictory. PW9 evidence is very unsatisfactory. I have also made reference to exh P25 — the Chemist Report. It does not tell much. It merely gives the net weight of cannabis as found in each of the 28packages marked A1 to A23 and B1 to B5. It does not reveal or indicate anything whatsoever as to the 32 samples taken for analysis. In a matter where the life of a subject is at stake, there is no room for any ambiguity and any doubt that arises must be given to the accused. The evidence of PW9, in its totality leaves a gap in the prosecution's case and it is doubtful that s 37(j) of the Act has been complied with. In any case involving the charge of trafficking, the weight of the drugs is most crucial for it is the weight of the drugs, among others that determines the charge to be preferred against the accused. It is therefore necessary that the prosecution must adduce sufficient credible evidence and the court applying a strict test on the evidence so adduced and ensuring strict compliance with any provisions of the law applicable in the matter.

DISCREPANCY IN EVIDENCE

[46] It was submitted by the defence that there are discrepancies in the evidence of PW4 and PW9, the two main witnesses of the prosecution. These two witnesses who led the team of police officers in apprehending the accused persons gave conflicting evidence on the details as to what happened during the operation which started from the Alor Star toll plaza and the events that happened at the Jelapang toll plaza. The two witnesses were cross examined on the details of what happened on the day and it is quite understandable that there may be discrepancies in their evidence with regard to the details of what took place. To start with, it must be realised that not all contradictions or inconsistencies in the evidence of a witness would render the witness untrustworthy and the evidence be ignored. Only material

contradictions matters. It is a question of credibility upon which the evidence of the witness is weighed. Having seen and heard the witness myself, I am entitled to make an evaluation on the credibility of the witness and the evidence given in court. In this respect, I can only refer to a passage from the judgment of Raja Azlan Shah FCJ (as His Royal Highness then was) in the case of *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1997] 1 MLJ 15 at p 19 which states:

> In this case different witnesses have testified to different part of what had happened or what had been said and also there are, in the evidence of the witnesses for the prosecution, some discrepancies as would be expected of witnesses giving their recollections of a series of events that took place in 1971–1973. In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons to accept one part of testimony of a witness and to reject the other. It is therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[47] Gopal Sri Ram (JCA) in *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14 observed that the human factor is a matter that must be taken into consideration. His Lordship at p 47 of the report said:

> However, the law, recognizing that much depends upon the human factor and vagaries of life, refuses to lay down any absolute rule in the matter of evidence evaluation. Witnesses are but human. Testimony may often be colored by emotion, benign or malice. Not all witnesses speak the whole truth, despite the oath of affirmation administered to them. Not all witnesses are devoid of bias of one sort or another. Recollection of events is seldom, if ever, perfect. Two or more persons witnessing the same incident may give varying, yet truthful, accounts of it according to their perception. There are so many other imponderables. The law would fail to meet the needs of society whose affairs it regulates if it does not take into account the incalculable variables that enter upon the scene when questions of appreciation of evidence arise.

[48] Having considered the evidence of these two prosecution witnesses, I formed the view that the discrepancies in their evidence are not material. The credibility of these two witnesses remains intact. The different description in their evidence as to the details of what actually took place on the day in question are minor discrepancies and do not go to the root of matter and does

not affect their credibility. Their evidence has withstood the test. The submission of the defence for the rejection of their evidence is unsustainable.

CONCLUSION

[49] A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that if unrebutted, it is sufficient to induce the court to balance in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that these facts existed or did happen (*Public Prosecutor v Dato Seri Anuar bin Ibrahim (No 3)* [1999] 2 MLJ 1, *Public Prosecutor v Saare Hama & Anor* [2001] 4 MLJ 480, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301).

[50] Having considered the evidence adduced by the prosecution, I found that the prosecution's case is flawed in many ways. The prosecution has not proven the basic ingredients for the offence of trafficking against the accused persons and there remains a gap in the prosecution's case. The chemist evidence is doubtful, and without the evidence of admissions by the accused persons, the prosecution has nothing at all to support the charge preferred against them. In all the circumstances of the case, I hold that the prosecution has not made out a *prima facie* case against all the four accused persons to warrant the calling of their defence and I accordingly acquit and discharge them.

Accused acquitted and discharged.

Reported by Peter Ling